No. 82-8

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IN THE

Supreme Court of the United States

October Term, 1982

CALIFORNIA STATE BOARD
OF EQUALIZATION

Appellant,

vs.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

MOTION BY APPELLEE TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGEMENT

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INTRODUCTION

The California State Board of Equalization (the "Board") seeks an appeal to this Court from a memorandum judgment of the Ninth Circuit Court of Appeals, which affirms two lower courts' holdings that a sale, such as the one which took place in this case, made pursuant to an order of the Bankruptcy Court for the purpose of liquidating the assets of the debtor estate is not subject to California sales or use tax liability.

In accordance with Rule 16 of the Rules of the Supreme Court of the United States, the appellee hereby moves to dismiss the Board's attempt to appeal on the ground that it is not within this Court's jurisdiction, and in the alternative, the appellee moves to affirm the judgment of the Ninth Circuit on the ground that there are no substantial federal questions requiring argument.

BECAUSE THE NINTH CIRCUIT DID NOT INVALIDATE CALIFORNIA'S SALES OR USE TAX STATUTORY SCHEME, THIS COURT MUST DECLINE THE BOARD'S INVITATION TO ACCEPT JURISDICTION OF THE APPEAL UNDER 28 U.S.C. SECTION 1254(2).

The Board has sought to invoke the jurisdiction of this Court on appeal under 28 U.S.C.§1254(2). *Appellant's Jurisdictional Statement, pages 3-4.* Section 1254(2) precludes review unless the aggrieved party is relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

The Board does not fall within the scope of that rule. The three-page memorandum judgment of the Ninth Circuit in this case is attached here as Appendix A. The language of the opinion is self-evident. The decision did *not* invalidate any portion of California's statutory scheme regarding the imposition of sales or use tax liability. Accordingly, no appeal may be taken and the judgment should be affirmed.

The law, as enunciated by this Court, has consistently required that a

Court of Appeals must invalidate a state statute on federal grounds or an appeal will not lie under §1254(2). *Public Services Commission of Indiana vs. Batesville Telephone Co.* (1931) 284 U.S. 6, 52 S.Ct. 1, 76 L.Ed.135 [appeal dismissed because appellate court rested its decision on state law grounds]. In accord, *Baxter v. Continental Casualty Co.* (1931) 284 U.S.578, 52 S.Ct. 2, L.Ed. 502; *Bradford Electric Light Co. vs. Clapper* (1931) 284 U.S. 221, 52 S.Ct. 118, 76 L.Ed. 254 [no appeal proper where appellate court merely applied state law].

The memorandum judgment entered here was similarly based solely on the ground that a sale of assets of the debtor estate pursuant to a bankruptcy court liquidation order, was not subject to either sales or use tax liability under California law. That holding was based on two prior decisions of the Ninth Circuit Court of Appeals, *State Board of Equalization vs. Goggin,* 191 F.2d 726 (1951), *cert den.* 342 U.S. 909, and State Board of *Equalization vs. Goggin,* 245 F.2d 44 (1957), *cert. den.* 353 U.S. 961. As the Ninth Circuit noted here, the rationale for the *Goggin* doctrine is that California's sales/use tax is a state excise tax on the "privilege of conducting a retail business." Therefore, no taxable sale under California law occurs when property of the debtor estate is sold pursuant to a liquidation order, since that kind of sale is not made in the ordinary course of operating a retail business. *Goggin I, supra,* at 729-30; *Goggin II, supra,* at 46-7. Thus, because the judgment entered in this case simply applied long established Ninth Circuit precedent construing California law not to subject liquidation sales conducted under the aegis of the Bankruptcy Court to sales or use tax liability, it follows that no federal question is raised upon which to base the Board's attempted appeal, and it should therefore be dismissed.[1]

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[1] In Appellant's Jurisdictional Statement, the Board refers repeatedly to a purported holding by the Ninth Circuit that federal law "precludes" imposition of sales or use tax liability in this case. The record is clear and speaks for itself—there was no such holding. At most, the second *Goggin* opinion, which was relied upon to some extent here, included a discussion of the adverse effect which either a sales or use tax would have if imposed on a Bankruptcy Court-ordered liquidation sale. However, beyond no stretch of the imagination did

NEITHER IS THERE A CONFLICT AMONG CIRCUITS ON WHICH THE BOARD MAY BASE ITS APPEAL.

In Appellant's Jurisdictional Statement, the Board also contends that there is a conflict among circuits as to the imposition of sales or use tax liability on a debtor estate liquidating assets under order of court, and cites two cases alleged to support its assertion: *In Re Leavy* (2d Cir. 1936) 85 F.2d 25 and *In Re Hatfield Construction Co.* (5th Cir. 1974) 494 F.2d 1179. However, upon analysis, it is clear that those cases do not conflict with the applicable Ninth Circuit authority and, indeed, further illustrate the correct foundation underlying the *Goggin* doctrine.

As the Board conceded below, intrepretation of the California Sales and Use Tax Law is a question of state law binding on the federal courts. *Richfield Oil Corp. v. Board of Equalization* (1946) 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80. California law has uniformly held that the sales/use tax is a direct obligation of the retailer—an excise tax for the privilege of conducting a retail business—not a tax on the purchaser, on the sale or because of the sale.[2]

Contrary to California law that the legal incidence of the tax is on the seller, both the New York City sales tax involved in *Leavy* and the Georgia sales tax involved in *Hatfield* was imposed on the purchaser.

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that discussion give rise to an invalidation, on federal grounds, of California's statutory sales and use tax scheme. Even if it can be read so expansively as to constitute a ground for the Court's decision, the second *Goggin* opinion, as did the first, also rested on the independent ground that state law would not tax a sale not made in the ordinary course of conducting a retail business. Since this case similarly applied state law, there remains no federal grounds on which to appeal under §1254(2).

[2] See *Western Lithographic Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 78 P.2d 731; *National Ice and Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal. 2d 283, 79 P.2d 380; *City of Pomona v. Board of Equalization* (1959) 53 Cal.2d 305, 1 Cal.Rptr. 489, 347 P.2d 904; *People v. Herberts* (1935) 3 Cal.App.2d 482, 39 P.2d 829; *Graham Brothers Inc. v. L.A.* (1935) 6 Cal.App.2d 203, 44 P.2d 452; *Roth Drugs v. Johnson* (1936) 13 Cal.App.2d 720, 57 P.2d 1022; *Xerox Corp. v. Orange County* (1977) 66 Cal.App.3d 746, 136 Cal.Rptr.583.

Leavy, supra, at 27; *Hatfield, supra,* at 1180. Since the purchaser was liable for the tax, the Second and Fifth Circuits, respectively, were compelled to sustain the imposition of tax liability since they were not confronted by the question whether the debtor estate was "conducting a retail business" when making bankruptcy court-ordered liquidation sales. Based, as they are, on facts dissimilar to those involved in this case, *Leavy* and *Hatfield* are distinguishable and, moreover, not in conflict with the *Goggin* doctrine inasmuch as California requires a resolution of the issue whether Bankruptcy Court-ordered liquidation sales are made in the ordinary course of conducting a retail business. The Ninth Circuit, applying California law, has consistently held that they are not, and the *Goggin* doctrine does not therefore conflict with the Second and Fifth Circuit decisions, since the latter have not even had occasion to address the issue resolved by the *Goggin* doctrine.

THE FOREGOING REASONS REQUIRE THAT THE JUDGMENT BE AFFIRMED.

There are no substantive questions involved here requiring further argument. This Court should decline jurisdiction of the Board's appeal for the alternative reasons that there is no conflict among the circuits on the issue resolved in this case by the Ninth Circuit, nor is §1254(2) applicable.

The final plea made by the Board in Appellant's Jurisdictional Statement conjures up nothing more than a parade of horribles which do not, and cannot, materialize in this case. The *Goggin* doctrine specifically addressed, and resolved, the tax consequences of a bankruptcy court-ordered sale of assets for purposes of liquidating the debtor estate. Such sales were properly ruled free from tax liability because they are not made in the ordinary course of conducting a retail business, which is the sole privilege California chooses to tax.

Because this case involved such a sale, exempt from tax liability, it is respectfully submitted that either the appeal be dismissed and/or the Ninth Circuit's judgment be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION, Appellant, vs. WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN, Appellee.	D.C. No. 80-0557-S BKCY. No. 77-0072-M No. 80-5737 **MEMORANDUM**

An Appeal from the United States District Court
for the Southern District of California
Hon. Milton L. Schwartz, Judge, Presiding
Argued and Submitted January 7, 1981

Before: PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge

Appellant California State Board of Equalization (Board) seeks to impose a state use tax on the sale of appellee Western Marina Corporations's (Western) assets. The sale occurred after Western filed a voluntary petition under Chapter XI of the Bankruptcy Act. The bankruptcy court appointed a receiver who operated Western's assets which consisted of the Shelter Island Inn (Shelter). A secured creditor for Shelter stayed foreclosure proceedings to allow the receiver time to reorganize or sell the assets. These efforts were unsuccessful. The receiver believed the debtor had no possibility of reorganization. The secured creditor

*The Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

reinstituted the foreclosure proceedings, but just before foreclosure, Western received two offers to purchase Shelter. The bankruptcy court rejected the first as not sufficiently qualified but accepted the second. The sale disposed of all Western's assets. Western remains in a Chapter XI proceedings, with no arrangement yet approved by the court.

The Board filed a claim of $5,911.90 for taxes due on the sale. Special tax counsel for the receiver objected. The bankruptcy court, relying exclusively on *State Board of Equalization v. Goggin,* 191 F.2d 726 (9th Cir. 1951) ("Goggin I"), and *State Board of Equalization v. Goggin,* 245 F.2d 44 (9th Cir. 1957) ("Goggin II") found that the sale of Western's assets was pursuant to a court order and therefore incurred no tax liability. The district court affirmed. The Board appeals.

Goggin I and *Goggin II* involved sales pursuant to liquidation orders in straight bankruptcy proceedings. Those cases lay down the law of this circuit that where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax.

The rationale for the *Goggin* doctrine is twofold. First, California law does not apply a sales tax to such transactions. The California sales tax is an excise tax on the "privilege of conducting a retail business." *Goggin I, supra,* at 729. The court reasoned that once liquidation proceedings commence, sale of the debtor's assets does not constitute "conducting a retail business," but constitutes ending a business and thus is not subject to the sales tax. *Goggin, I, Id.*

Second, the Supremacy Clause limits local tax burdens on federal officials. Based on this principle this court held that either a sales or a use tax "constitutes an unlawful interference with the process of the court of bankruptcy and is invalid." *Goggin II, supra,* at 46.

As the Board notes, federal law subjects all United States court officials who conduct business to "all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C. § 960. In *Goggin II,* this court

held that §960 "designated sales in the *course of operation of a business* as the sole area" where the state may impose a tax. (Emphasis added.) *Goggin II, supra,* at 46. The court then held that sales in liquidation pursuant to a court order are not sales in the course of the operation of a business and thus not subject to a local tax. Thus, § 960 does not provide the Board a basis on which to tax liquidation sales ordered by the bankruptcy court.

Goggin I and *Goggin II* are the controlling precedent in this circuit. Consistency requires us to apply the doctrine to all liquidation sales conducted under the aegis of the bankruptcy court.[1] Such sales, like the sale of Shelter, are not conducted in the course of the operating a retail business. Like the sales in *Goggin,* the Shelter sale terminated the bankrupt's business. A tax on this sale would impose a burden on the liquidation process equal to a tax on a formal bankruptcy sale. Under *Goggin,* the state may not impose such a tax.

While we deem ourselves bound by *Goggin I* and *Goggin II* as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. *Cf., In re Hatfield Construction Company,* 494 F.2d 1179 (5th Cir. 1974); *In re Leavy,* 135 F.2d 134 (8th Cir. 1943).

We AFFIRM.

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[1] This exemption from the sales and use tax does not apply to normal sales in the course of a receiver operated business, or to the sale of assets for the purpose of reorganization rather than liquidation. It only applies to situations, such as that here, that are functionally equivalent to a straight bankruptcy proceeding.